(5)

No. 06-1132

In The
Supreme Court of the United States

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Petitioners,

v.

Robert M. Gates,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Pursuant to S.Ct. R. 15.6, Petitioners respectfully submit this Reply in response to the Solicitor General's filing ["U.S. Br."]. Without even commenting on the wide impact and invidious discrimination that the Uniformed Services Former Spouses' Protection Act ("USFSPA", or "the Act"), 10 U.S.C. § 1408, has for nearly one million American citizen-warriors, see Pet. 6, the government attempts to deflect and down-play many of the serious constitutional defects of the statute, and suggests that further review is unwarranted. But closer examination of the merits of the petition will reveal that petitioners have raised very serious questions as to the constitutionality of the statute, involving fundamental rights concerning veterans' choices of occupation and the right to marry. The Court should grant certiorari in respect to all of the constitutional challenges raised here.

A. Petitioners' Retroactivity and Equal Protection Challenges Deserve Review Based on Incongruent Rulings by this Court in *Tyler*, *Larionoff*, *McCarty* and *Barker*, Regarding the Status of Military Retired Pay as a Personal Asset.

The Solicitor General attempts to diminish petitioners' substantive due process (retroactivity) and equal protection challenges to USFSPA, arguing (U.S. Br. 7-12) that the Fourth Circuit's ruling is not in conflict with previous decisions of this Court regarding the status of military retired pay as a personal asset of the servicemember. The government's contentions are mistaken; the ruling below is in substantial conflict with the previous decisions of this Court, and raise serious questions as to the constitutionality of USFSPA.

1. The government's discussion (U.S. Br. 7-9) of the

retroactive effects of USFSPA on those who entered the armed forces prior to its enactment in 1981, proceeds on three fatal assumptions: one factual, one procedural, and one precedential.

a. The government claims that the Act is not impermissibly retroactive because it does not "attach[] new legal consequences to events completed before its enactment." U.S. Br. 8 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994)). Aside from failing to note this Court's corollary comment in *Landgraf* – that "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," id. – the government's factual assumption fails to answer petitioners' contention that USFSPA did, in fact, upset settled expectations about the disposition of military retired pay as an inalienable and unencumbered personal asset of servicemembers.

Prior to USFSPA's enactment, only 11 states recognized the possibility of divisibility of military retired pay as part of a marital estate upon divorce. See Pet. 16 & n.2. It is simply extravagant to assert, as the government does here, that USFSPA "merely" restored the prerogative of state divorce courts to treat retired pay as a marital, instead of a personal, asset. U.S. Br. 8. USFSPA, coming after this Court's ruling in *McCarty v. McCarty*, 453 U.S. 210 (1981), represented a sea-change in the treatment of military retired pay, one that certainly qualifies under the *Landgraf* analysis as "attaching new legal consequences to events completed before its enactment," when viewed with the "nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." 511 U.S. at 269.

b. The Solicitor General has also assumed that

no petitioner had standing to challenge the retroactivity of USFSPA, because none joined the armed forces in the period between *McCarty*'s decision (in June 1981) and USFSPA's enactment (September 1982). See U.S. Br. 6, 8. While no named petitioner fits this category, the court below failed to consider whether any member of the associational plaintiff, ULSG, might qualify. As the district court found, there were members of ULSG who had joined prior to the USFSPA's enactment, Pet. App. 47a, but were disqualified by the district court on *Rooker-Feldman* and standing grounds from bringing a retroactivity challenge. Those grounds were reversed by the Fourth Circuit. See Pet. App. 9a-12a. The court of appeals ruled only that no named plaintiff had standing to bring a claim in regards to the period between June 1981 and September 1982, Pet. App. 15, without considering whether an individual member of ULSG fit that profile, as the district court found.

c. Lastly, the government makes an unavailing attempt to distinguish this Court's holding in *United States v. Larionoff*, 431 U.S. 864, 879 (1977), as standing for the proposition that Congress may not deny a military service benefit, once granted. The government appears to concede that *Larionoff* properly held that a retroactive denial of a military service benefit would present "serious constitutional questions," id., even where Congress sought expressly to later deny that benefit. U.S. Br. 9 (citing *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935)). The government suggests that all USFSPA did was, in the wake of this Court's holding in *McCarty*, to restore state authority to divide military retired pay as part of a marital asset. U.S. Br. 8.

Left unmentioned by the Solicitor General is that the vast majority of servicemembers in 1982 had a valid expectation interest that their military retired pay was a *personal* asset, unencumbered by any claims by a marital estate, and not subject

to state law. Again, this is borne out by respondent Secretary's own report, that as of June 1981, the vast majority (39 of 50) of states had held that military retired pay was a personal asset. See Pet. 16 n.2. It is thus spurious to suggest that USFSPA changed nothing, and had no retroactive consequences for those already in the armed forces at the time of its enactment.

2. The government's grounds for disputing the validity and significance of petitioner's equal protection challenge are likewise unconvincing.

a. For starters, the parties do not agree on the relevant standard of review for petitioners' equal protection claim, and the government's reliance on *Heller v. Doe*, 509 U.S. 312 (1993), is unavailing, inasmuch as in *Heller* the challenger conceded the applicability of rational review. See id. at 319. And despite the government's suggestion, U.S. Br. 10 n.2, petitioners have argued, under this Court's decision in *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), that Congress in adopting USFSPA "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse affects upon an identifiable group." Id. at 279.

As petitioners have demonstrated, see Pet. 19 n.3; Pet. App. 18a, there was "covert sex-based discrimination," id. at 274, in the adoption of USFSPA. Even the Act's concededly gender-neutral language of referring to "spouses" is belied by its references to servicemembers as being males, and the recipients of a divided marital estate as being women.[1] Moreover, as this

[1] See, e.g., 10 U.S.C. § 1408(c)(1) ("Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and *his* (continued...)

Court in *Feeney* observed, a requisite inference of discriminatory intent can be drawn from the "foreseeable consequences" of the legislation. Id. at 278; see also id. ("It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.").

And even if rational basis scrutiny is applied here, petitioners will maintain that USFSPA cannot satisfy that test. Insofar as the government argues that "Congress was concerned with the financial security of the military spouse who often makes enormous sacrifices in that role," U.S. Br. 10 (citing S. Rep. No. 502, 97th Cong., 2d Sess. 6 (1982)), such a rationale sweeps too broadly to support the Act.

b. The government as much as concedes (U.S. Br. 11) that this petition properly raises the question left open in *McCarty*, of "whether federal law prohibits a State from characterizing retired pay as deferred compensation," 453 U.S. at 223, even as it decided that military retired pay is "reduced compensation for reduced current services." Id. at 222 (citing *United States v. Tyler*, 105 U.S. 244, 245 (1881)). The government attempts to salvage its argument by relying on this Court's more recent decision in *Barker v. Kansas*, 503 U.S. 594

[1](...continued)
spouse in accordance with the law of the jurisdiction of such court."); 1408(c)(4) ("A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) *his* residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) *his* domicile in the territorial jurisdiction of the court, or (C) *his* consent to the jurisdiction of the court.") (emphasis added).

(1992), but that decision was expressly limited to the question of whether states can decline to treat military retired pay as a pension for purposes of intergovernmental tax immunity under 4 U.S.C. § 111. See 503 U.S. at 596, 605. *Barker* did not deal with characterizing military retired pay for purposes of distinguishing it as a personal asset, as opposed to a marital asset. See id. at 600-03. The government apparently concurs with this limited reading of *Barker*. See U.S. Br. 11-12.

Nevertheless, the government insists (U.S. Br. 12) that *Barker* forecloses petitioners' argument here. This cannot be the case because *Barker* specifically noted *McCarty*'s limited holding, see 503 U.S. at 601, and "'the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that *States must tread with caution in this area*, lest they disrupt the federal scheme'." Id. at 602 (quoting *McCarty*, 453 U.S. at 224 n.6) (emphasis added by the *Barker* Court). Finally, *Barker* notes:

> Because the premise behind permitting the States to apply their community property laws to military retirement pay is that such pay is deferred compensation for past services, see *McCarty*, supra, at 221, Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services. To extend to States the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services.

Id. at 603. It cannot be plausibly argued that this Court has granted an open license for state courts to "characterize military retired pay as deferred compensation" (U.S. Br. 12), for all

purposes.[2]

B. **Petitioners' Procedural Due Process and Uniformity Challenges to USFSPA Merit Review.**

1. a. The government suggests (U.S. Br. 3, 13) that regulations issued pursuant to USFSPA grant substantial procedural protections to servicemembers whose retired pay is being garnished by respondent Secretary's Defense Finance and Accounting Service (DFAS). As Petitioner has already explained, Pet. 4-5, 22, these lauded protections are largely illusory. The primary defect of the current scheme is that as long as a state court divorce decree appears "regular on its face," 10 U.S.C. § 1408(b)(2); Pet. App. 82a, DFAS will not further review the matter to determine whether the state court had proper personal jurisdiction over the military retiree, within the meaning of USFSPA section 1408(c)(4); Pet. App. 83a. See DODFMR ¶291003; see also Pet. App. 6a-7a; Brief *Amici Curiae* of American Retirees Association *et al.* 7-8. Moreover, the appeals procedures that the government cites, at 32 C.F.R. 282.5(b), are inapplicable to challenge DFAS's garnishments.

b. The government glibly overlooks the extent

[2] This tension has been noted in a number of recent cases, including *United States v. Sumrall*, 45 M.J. 207, 209 (C.A.A.F. 1996) ("Accordingly, a substantial question exists whether he has a legally sufficient property interest at the present time for purposes of a Due Process Clause claim. See *United States v. Larionoff*, 431 U.S. (1977); *Zucker v. United States*, 758 F.2d 637 (Fed. Cir.1985); see also *Norman v. United States*, 392 F.2d 255, 265 (Ct. Cl. 1968) (citing *Bell v. United States*, 366 U.S. 393 (1961)); but see *Barker v. Kansas*, 503 U.S. 594, 605 (1992) (military retirement benefits are to be considered deferred pay for past services for purposes of 4 USC § 111).").

to which the Fourth Circuit's use of *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), infected its procedural due process calculus under *Mathews v. Eldridge*, 424 U.S. 319 (1976). As already explained, Pet. 23-24, the Fourth Circuit's emphasis on empirical evidence of DFAS errors in processing garnishment claims is directly related to its reading of *Endicott*'s now-discredited holding that no new process is due where garnishments were previously made by a state court. Moreover, there is substantial evidence of mistakes being made by DFAS, according to respondent Secretary's own findings. See Pet. 24 n.5 (citing DoD Inspector General reports).

2. As for petitioners' uniformity challenge, it is significant that the government offers no explanation as to the manifest disparities by state courts in the application of USFSPA's many material provisions. See Pet. 5. Indeed, it appears to accept the fact that retired servicemembers are subject to disparate treatment under the Act in many states, and no uniformity is present here. The government goes so far as to assert (U.S. Br. 15) that this was Congress's actual intent in legislating USFSPA. Such a position is unsustainable.

a. The government relies (id.) on cases decided under the Armed Forces Clauses to justify broad judicial deference to congressional action in this field, extending so far (as the government suggests) to the wholesale application of unfettered state law in the disposition of military benefits. But, as previously explained, Pet. 25-26, this Court's precedents do not sweep so broadly as to reach that result. Moreover, Congress, in enacting USFSPA, was responding to this Court's ruling in *McCarty*, which made express that

> there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not sufficient"; the question remains

> whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S., at 581-583. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests. See *United States v. Yazell*, 382 U.S., at 352. Under the Constitution, Congress has the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST., Art. I, § 8, cls. 12, 13, and 14.

Id. at 232. By this Court's ruling in *McCarty*, Congress was under an obligation – in legislating the modalities of division of military retired pay under the Armed Forces Clauses – to do so in a uniform manner and failed to do so with USFSPA. See Brief *Amicus Curiae* of GI-JANES, at 8.

b. The government appears to concede (U.S. Br. 15) that an additional constitutional authority for Congress enacting USFSPA was the Full Faith and Credit Clause, but still insists that despite the textual qualification that Congress must act via "general Laws," U.S. CONST. Art. IV, § 1, such does not affirmatively oblige Congress to legislate uniformly. The uniformity commands of the Armed Forces and Full Faith Clauses operate in a different way than the Bankruptcy and Naturalization Clauses, precedents under which the government cites to argue that the only uniformity that Congress need legislate is an ostensible geographical conformity.

The primary constitutional defect of USFSPA, in this respect, is its unfettered grant to state courts to opt-out of uniform federal law in the disposition of military retiree benefits. Bankruptcy and naturalization decisions are made by

federal courts, applying federal law, and, to the extent authorized by Congress, state law. With USFSPA, Congress has wholesale delegated to the states the power to render non-uniform judgments as to military retired pay. Indeed, in one of the cases relied upon by the government, *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001), the court of appeals made clear that Congress had to be express in allowing state courts to apply state law in construing a federal statute. See also *Nemetz v. INS*, 647 F.2d 432, 435-36 (4th Cir. 1981) (applying state law was inconsistent with the uniformity requirement of Naturalization Clause). This important question of the uniformity of federal military benefits law deserves review.

CONCLUSION

For the reasons herein stated, and those previously presented, the petition ought to be granted.

Respectfully submitted,

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